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National Bar Association
in Support of [illegible]

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QUESTIONS PRESENTED

Whether a popularly enacted state constitutional amendment that bars all levels and branches of state government from remedying discrimination on the basis of homosexual or bisexual orientation is constitutionally invalid where the amendment is motivated by irrational fear and hatred of a politically unpopular and independently identifiable group.

Whether a popularly enacted state constitutional amendment that bars all levels and branches of state government from enacting or enforcing laws prohibiting discrimination on the basis of homosexual or bisexual orientation violates a privilege or immunity of United States citizens under the Fourteenth Amendment by rendering futile the opportunity to peaceably assemble and to petition government.

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STATEMENT OF CASE

Amicus adopts the statement of the case as presented by Respondent.

CONSENT OF THE PARTIES

Petitioners and Respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The National Bar Association ("NBA"), founded in 1925, is an organization comprised of over over 20,000 lawyers --- most of whom are African American --- located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, societal and economic welfare of African Americans and other socially and economically disadvantaged Americans.

Amicus understands all too well the issues associated with this case and the old arguments on the capacity of self-government to secure rights for African Americans. *Amicus* believes that it is in its interest to side with Respondents in this case because Petitioners' argument that the expansion of rights leads to a meaningless self-government endangers discrete groups in the population. Such arguments leave disadvantaged groups unprotected by law and beyond the reach of a remedy at law --- justified by a narrow reading of American history, customs and traditions. This view arouses *Amicus* to demonstrate a contrasting interest and to ponder whether Respondents should be foreclosed by such arguments? The experience of African Americans in this country compels *Amicus* to answer this question in the negative. A claimed "ordered liberty" which, contrary to the equal protection clause of the Fourteenth Amendment, harms by action or inaction of the state, and limits incorporated, legally protected

interests beyond the scope of judicial review, can give rise to "ordered harm."

SUMMARY OF THE ARGUMENT

On November 3, 1992, a bare majority of Colorado voters approved a state constitutional amendment ("Amendment 2" or "Amendment"). Recognizing that the Amendment divested Colorado's gay, lesbian and bisexual citizens [hereinafter "homosexual citizens"] of the fundamental right to equally and effectively participate in the state's political processes, the courts of Colorado enjoined its enforcement. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) [hereinafter *Evans I*]; *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) [hereinafter *Evans II*].

The actual purpose underlying enactment of Amendment 2 was to target for harm a politically unpopular group. This goal is evidenced by the fear, hatred, and intolerance that drove supporters of Amendment 2. They "portray[ed] gays as sex-crazed, disease-ridden perverts out to destroy the traditional family." *All Things Considered: Gay Rights Battle Heats Up in Colorado* (National Public Radio broadcast, Feb. 12, 1993) [hereinafter "NPR Broadcast"]. This actual purpose mandates that even under rational basis review, the Amendment should be found unconstitutional. *See USDA v. Moreno*, 413 U.S. 528 (1973). No legitimate state goal can be posited that would be served by implementing the Amendment. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

Furthermore, Amendment 2 improperly places the state's power, authority, and sanction behind private biases and discrimination in contravention of the principle recognized in *Reitman v. Mulkey*, 387 U.S. 369 (1967), by depriving all branches, agencies and political subdivisions of the state of any power to ameliorate discrimination visited upon the homosexual citizens of Colorado based on their sexual orientation. Unlike the factual situation presented to the Court in *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982), upon which

Petitioners rely for reversal, homosexual Colorado citizens may be powerless to pursue any remedy to answer acts of invidious discrimination. In particular, homosexual African Americans would have no redress against discrimination based on race if that discrimination is camouflaged as based on sexual orientation. Thus, Amendment 2 may create a situation where homosexual citizens of Colorado have no rights, in public or private interactions, which heterosexuals are bound to respect. *Cf. Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

Amendment 2 also infringes on the fundamental right of equal participation in the political process by burdening an identifiable, and politically unpopular, group --- homosexual citizens --- when that group desires to enact legislation that affords protection from invidious discrimination. This political ostracism is antithetical to the historical protections afforded political and social minorities from the tyranny of intolerant majorities. The precedents of the Court direct that the Amendment be reviewed under heightened scrutiny and struck down as unconstitutional. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Colorado Supreme Court assumed, *arguendo*, that promoting religious liberty may be a substantial governmental interest. *Evans II*, 882 P.2d at 1342-43. However, Amendment 2 does not advance or unburden the free exercise of religion. Rather, it violates the Constitutional mandate that government remain neutral in matters of religion by promoting and favoring a particular religious view. *See Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

Amendment 2 impermissibly violates the privilege or immunity of Colorado's homosexual citizens to peaceably assemble and petition the government for redress of grievances in contravention of Clause 1 of the Fourteenth Amendment of the United States Constitution. *Evans II*, 882 P.2d at 1351 (Scott, J., concurring). Amendment 2 also impermissibly burdens the fundamental and long-recognized right of citizens to travel freely

between the states. *See Edwards v. California*, 314 U.S. 160 (1941); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230); *cf. Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964).

Furthermore, Amendment 2 also impermissibly burdens certain First Amendment rights. By divesting all branches of state government of the power to remedy harms caused by irrational individual biases --- establishing state-sanctioned discrimination --- Amendment 2 creates an atmosphere of fear that chills those most opposed to the Amendment from voicing their political opposition to its enactment. This burden on the fundamental right of free expression is contrary to the Court's long-established precedents. *See Roth v. United States*, 354 U.S. 476, 484 (1957); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

ARGUMENT

I. AMENDMENT 2 FAILS UNDER RATIONAL BASIS REVIEW BECAUSE ITS ACTUAL PURPOSE IS TO TARGET FOR HARM HOMOSEXUAL CITIZENS BY EMPOWERING, AND IMPERMISSIBLY INVOLVING THE STATE IN, PRIVATE DISCRIMINATION.

The Court has found unconstitutional under rational basis review government actions that target for harm non-suspect, politically unpopular or feared groups. *USDA v. Moreno*, 413 U.S. at 528; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 432. The statements, actions, and campaign materials of Amendment 2's supporters reveal that the Amendment's actual purpose is to target for harm a politically unpopular group --- an impermissible purpose under the Court's decisions in *Moreno* and *Cleburne*. As *Amicus* points out, *infra*, the means chosen by Petitioners encourage private discrimination and therefore cannot advance any legitimate government interest. Thus, *Amicus* submits that Amendment 2 violates the Equal Protection Clause of

the Fourteenth Amendment.

A. Amendment 2 Fails Under Rational Basis Review Because the Actual Purpose of the Amendment is to Target for Harm Homosexual Citizens.

Amendment 2 is unconstitutional because its actual purpose --- to target for harm a politically unpopular group --- is based on irrational fear and hatred of that group. In *Moreno*, the Court held that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *USDA v. Moreno*, 413 U.S. at 534. The Court, using rational basis review, struck down an amendment to the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), denying food stamps to households in which unrelated individuals resided. *USDA v. Moreno*, 413 U.S. at 529. The Court found that the purpose stated in the amendment's legislative history, "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," *id.* at 534, did not pass constitutional muster.

Likewise in *Cleburne*, the Court found that "mere [unsubstantiated] negative attitudes, or fear . . . are not permissible bases" for disparate treatment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. at 448. Furthermore, the Court held that

> the electorate[,] . . . whether by referendum or otherwise, cannot order [government] action violative of the Equal Protection Clause, . . . [nor] avoid the strictures of the Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Id. (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citation omitted)). The actual purpose of Amendment 2, and the irrational fear and hatred of homosexuals that prompted its passage, are revealed by the campaign statements and materials of the Amendment's supporters. This purpose can also be found in the climate of intolerance surrounding the issue of homosexuality in Colorado. For example, Colorado for Family Values ("CFV"), drafters of Amendment 2, was a primary promoter of the Amendment and spearheaded the referendum campaign. CFV distributed pamphlets containing unsubstantiated allegations that exacerbated an irrational fear and hatred of homosexuals. Certain CFV literature contained the spurious claim that "73 percent of homosexuals admit having sex with minors and 28 percent admit having sex with more 1,000 partners . . . [and] most gays urinate or defecate on their partners." Ned Zeman et al., *No Special Rights for Gays*, Newsweek, Nov. 23, 1992, at 32. Other CFV literature claimed, "gays 'are 12 times as likely' as heterosexuals to molest children and are out to 'destroy' the American family," Michael Meyer & Kenneth L. Woodward, *Onward Muscular Christians*, Newsweek, Mar. 1, 1993, at 68; and that "gays [are] sex-crazed, disease-ridden perverts out to destroy the traditional family." NPR Broadcast, *supra*. Another group supporting Amendment 2, Focus on Family, issued similar disinformation claiming that "'homosexual men ingest, on the average, the fecal material of 23 different men per year.'" Meyer & Woodward, *supra*.

The actual purpose of Amendment 2 is further revealed in statements made at a CFV-sponsored conference in Colorado Springs. At this conference, the executive director of Focus on Family said that "the gay agenda has all the elements of that which is truly evil." Tom Roberts, *Right Takes New Aim at Gays: Conservative Christians, In Secret Meeting, Lay Plans to Fight 'Evil' of the Gay Agenda: May 1994 Conference in Colorado Springs, CO*, Nat'l Catholic Rep., Sept. 2, 1994, at 4. Another speaker asserted that "equality is a new 'Satanic religion' and that 'inequality make[s] life better for the general mass of folk.'" *Id.*

In addition, one goal of a written course of action outlined by conference participants was to "[e]xpose that homosexuality . . . [is] . . . criminal. Homosexuals are [the] largest consumers of pornography. Hound-Hound-Hound. Drive it home!!!" *Id.*

The indications of the fear and hatred that motivated passage of Amendment 2 are found in the threats and acts of persecution against homosexuals citizens. For example, homosexual citizens have been victims of anonymous slurs and threats: "You queer dyke bitches!" (call to a women's bookstore in Denver); "You got too many fags and queers working there" (call to another Denver bookstore); "We're going to blow up your f------ building" (call to the Denver Gay and Lesbian Community Center); "FAGGOTS GET OUT OF THE ARTS" (message scrawled at the Denver Center for Performing Arts). Zeman, *supra*. The apartment door of an opponent of Amendment 2, on which was displayed a "No On [Amendment] 2" bumper sticker, was burned. Mark Shaffer, *Colorado Battling Boycott Over Anti-Gay Law*, Times-Picayune (New Orleans), Jan. 10, 1993, at A3. Immediately following the passage of Amendment 2, incidents of violence against homosexual citizens in Colorado increased, with "homophobic incidents tripl[ing] during November and December" of 1992. UPI, *Survey Shows an Increase in Homosexual-Related Violence*, Mar. 11, 1993, NEXIS NEWS Library, WIRES File. Indeed, the increase in violence against homosexual citizens in Denver continues despite a nationwide downward trend in levels of violence against homosexuals. UPI, *Reports of Anti-Gay Crimes Down*, Mar. 8, 1994, NEXIS, NEWS Library, WIRES File.

The foregoing establishes that the actual purpose of Amendment 2 was to target for harm a politically unpopular group. Its passage was motivated by an irrational and unsubstantiated fear of homosexuals similar to and, *Amicus* submits, even more alarming than, the irrational fear and hatred that were found to be constitutionally impermissible in *Moreno* and *Cleburne*.

Petitioners have asserted that Amendment 2 is rationally

related to several governmental interests. However, "just as the intentional harming of a group is not a legitimate goal, so too the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest." *Medoria v. Colautti*, 602 F.2d 1149, 1155 n.14 (3d Cir. 1979). As the United States so aptly stated in its *Amicus Curiae* brief, signed by Solicitor General Rex Lee, "even where [a] predicate exists for making frequent and pervasive distinctions . . . such distinctions may, in a particular case, be the cover for invidious hostility to a disfavored group, rather than a choice among competing legitimate ends." Brief for the United States as *Amicus Curiae* at 16, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (No. 84-468). Because Amendment 2 intentionally targets for harm homosexual citizens, the Amendment is not a rational means to further any governmental interest.

B. Amendment 2 Significantly Encourages and Involves the State in Private Discriminations, an Impermissible Means of Advancing Any Governmental Interest.

Amendment 2 unconstitutionally places the state's power, authority and sanction behind acts of private discriminations,"significantly encourag[ing] and involv[ing] the State in private discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). In *Reitman*, the citizens of California amended the State constitution by enacting Proposition 14, which allowed a property owner to discriminate on any basis when selling or renting property. Proposition 14 not only overturned two California statutes proscribing discrimination in housing but also barred the state and any of its subdivisions from enacting laws that outlawed discrimination in housing. The Court found it constitutionally repugnant that "the right to discriminate . . . was . . . embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Reitman v. Mulkey*, 387 U.S. at 377. The Court was especially concerned that "[t]he right to discriminate [was] . .

. one of the basic policies of the State." *Id.* at 381.

Colorado's Amendment 2 has the same effect as California's Proposition 14. Not only would Amendment 2 repeal local ordinances proscribing discrimination on the basis of homosexual or bisexual orientation, but it also would embody in the Colorado constitution authority which individuals could invoke when discriminating. For example, landlords in Colorado could capriciously evict homosexual tenants, justifying their action on authority granted by the state. Clearly this is unconstitutional because "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 433.

Additionally, *Amicus* believes that Amendment 2, if allowed to stand, will provide an absolute defense for discriminating on the basis of race or other suspect classification. Amendment 2 would allow individuals to discriminate against citizens merely because an individual *thinks* that the other is gay. Thus, under Amendment 2 a bigoted employer could deny a position to any African American by simply asserting that he thought the applicant was homosexual, while the actual reason may be race-based. Enforcement of any anti-discrimination law would become almost impossible. Discriminators would be effectively immunized from liability by merely asserting that the accuser looked homosexual or seemed homosexual.

Petitioners attempt to draw the Court's attention away from the precedential impact of *Reitman* by asserting that "*Crawford* controls."[1] (Br. for Pet'r at 33). *Amicus* submits that *Crawford* is easily distinguished and simply does not control. *Crawford* merely held that the electorate of California could choose which remedies were available to the state courts to redress violations of state law. *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. at 535-36. *Crawford* does not stand for the proposition that all branches of state government may be foreclosed from ameliorating the effects of invidious

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[1] *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982).

discrimination. The facts in *Crawford* reveal that under the California constitution, all branches of state and local government continued to have a duty to implement remedies that exceeded the requirements of the federal Constitution. *Id.* at 535-36. Unlike the amendment in *Crawford*, Amendment 2 withholds all remedies from homosexual citizens for intentional discrimination and prohibits any legislative, administrative, or judicial action that would remedy discrimination against them. This is clearly unconstitutional under the Court's decisions in *Reitman* and *Palmore*.

II. AMENDMENT 2 SHOULD BE REVIEWED UNDER HEIGHTENED SCRUTINY BECAUSE IT IMPINGES ON THE FUNDAMENTAL RIGHT OF EQUAL PARTICIPATION IN THE POLITICAL PROCESS.

The precedents of the Court mandate use of heightened judicial scrutiny in cases where a majority acts to restructure the political process to purposefully disadvantage a minority. A law's

> presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer v. Union School Free Sch. Dist., 395 U.S. 621, 628 (1969). Similarly, "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny . . . ." *City of Richmond v. J.A. Croson*, 488 U.S. 469,

495-96 (1989). *Amicus* contends, as discussed at length in Section I, *supra*, that in passing Amendment 2 the people of Colorado have purposefully acted to disadvantage homosexuals in the state political process based on irrational and unwarranted fears.

A. Amendment 2 Impinges on the Fundamental Right of Equal Participation in the Political Process and is Therefore Subject to Strict Scrutiny Review.

The Supreme Court of Colorado correctly held that "the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny." *Evans I*, 854 P.2d at 1276 (footnote omitted).

Amicus is aware that the fundamental right to equal participation in the political process is not explicitly stated[2] in the text of the Constitution. However, the Court has recognized this right as fundamental because it is "preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. at 562, and because it "is the essence of a democratic society." *Id.* at 555. The Court explicitly defined the fundamental right of equal participation in the political process in *Hunter v. Erickson*, 393 U.S. at 385. There the Court stated, "the state may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393 (emphasis added). The right may also be fundamental under Article II, § 3 of the Colorado State

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[2] Rights do not have to be enumerated in the text of the Constitution in order to be recognized as fundamental. For example, the right to travel freely from state to state has no textual basis in the Constitution, but has long been recognized by the Court as fundamental. *See United States v. Guest*, 383 U.S. 745, 758 (1966). *See also* U.S. Const. amend. IX.

Constitution.[3]

Amendment 2 implicates this recognized fundamental right because it politically ostracizes the homosexual citizens of Colorado. If enforced, the Amendment would foreclose effective lobbying towards enactment of local ordinances, or even state wide statutes, drafted to protect an independently identifiable group from invidious discrimination. *Amicus* is particularly concerned that this burden exceptionally affects African American citizens of Colorado who are homosexuals. The higher burden Amendment 2 would impose on African American homosexual citizens who wish to have ordinances and laws enacted to protect themselves from discrimination clearly violates the fundamental right recognized in *Hunter*. Amendment 2 would leave homosexual citizens with no method of protecting themselves from discrimination, except the burdensome process of amending the state constitution.[4] This sole method of change left to homosexuals is illusory. In reality, a Babylonian wall has been erected, creating near futility for those who try to scale its insuperable height.

Petitioners have urged a narrow construction of the rule announced in *Hunter*, contending that the city charter amendment at issue in that case failed only because it burdened a racial minority, (Br. for Pet'r at 19-24), and that application of *Hunter*

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[3] The Colorado Constitution, provides, "[a]ll persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Colo. Const., art. II, § 3.

[4] *Amicus* contends that the District Court in Cincinnati correctly observed that "allowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation unless they request it directly from the very majority that deprived them access to the legislature in the first place, violates even rudimentary notions of fundamental fairness, and undermines the integrity of our nation." *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 433 (1994), *rev'd*, Nos. 94-3855, 94-3973, 94-4280, 1005 U.S. App. LEXIS 10462 (6th Cir. May 12 ,1995). For a discussion of the full practical scope of this burden see section VI, *infra*.

should therefore be limited to situations where a racial minority is the group burdened. (Br. for Pet'r at 19.) Petitioners misstate *Hunter*. Specifically, Petitioners' argument is flawed in two respects: First, a plain reading of *Hunter* and its underlying facts indicate the Court was not restricting its holding to cases involving racial minorities; second, petitioners misinterpret the cases on which they rely to support a narrow construction of *Hunter*.

The *Hunter* Court found the charter amendment at issue was constitutionally repugnant not because it burdened a racial minority alone, but because it "disadvantages those who would benefit from laws barring racial, *religious, or ancestral* discriminations." *Hunter v. Erickson,* 393 U.S. at 391(emphasis added). Thus, the fundamental right recognized in *Hunter* is vested in racial minorities *and in other identifiable groups*. Additionally, it is significant to note that the Court based its final holding on cases that did not involve any impermissible racial classification. *Id.* at 393 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968)).

Petitioners contend that the Court's decision in *James v. Valtierra,* 402 U.S. 137 (1971),[5] should be read to limit the *Hunter* rule exclusively to situations where racial minorities are affected. (Br. for Pet'r at 24). This is a misreading of the *Valtierra* decision. The Court's decision in *Valtierra* merely helped define the contours of the right recognized in *Hunter*: The Court did not apply *Hunter* to a situation where the persons burdened are "a diverse and shifting group." *James v. Valtierra*, 402 U.S. at 142. Soon after *Valtierra*, the Court, in *Gordon v. Lance*, 403 U.S. 1 (1971), further clarified the contours of the fundamental right of equal participation in the political process. There the Court refused to invalidate an electorate super-majority approval requirement for bond indebtedness because it could "discern no *independently identifiable group or category* that

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[5] In *Valtierra,* the Court declined to strike down a requirement that approval for low-income housing projects be subject to local referenda.

favors bonded indebtedness over other forms of financing. Consequently, no *sector of the population* may be said to be 'fenced out' from the franchise because of the way they will vote." *Id.* at 5 (emphasis added) (citation omitted).

Read together, *Gordon* and *Valtierra* stand for the proposition that the fundamental right defined in *Hunter* extends to situations where the group burdened is an "identifiable class" independent of its common political goal. *Id.* at 7. These cases are best understood to mandate that qualification as an independently identifiable group is limited. The members of the putative independently identifiable group must establish the existence of a dual relationship. That is, the members of the group must seek similar political ends *and* must have some metaphysical and cultural indicia of commonality independent of the political goal.[6]

The homosexual citizens of Colorado are independently identifiable under this two-prong test: They seek the political end of protection from invidious discrimination, and they share an indicium of commonality in sexual orientation independent from the desired political protection. Amendment 2, by eviscerating homosexual citizens' right to pass self-protective legislation, impermissibly impinges on this independently identifiable group's fundamental right to equally participate in the political process. Such treatment by the majority over a minority casts shadows of long-since-rejected customs of denying rights and privileges of citizenship to a minority. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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[6] The requirement of the metaphysical and cultural characteristic of commonality, independent of the political goal, eliminates the concern that organizations like political parties could be recognized within the independently identifiable group ambit. Courts have no trouble recognizing when a group has claimed independently identifiable status based on a political goal that erroneously attempts to find status as metaphysical commonality. *E.g. Gordon v. Lance*, 403 U.S. 5, 7 (1971).

B. Amendment 2 Serves No Legitimate State Interest in Advancing Free Exercise of Religion and Creates an Establishment of Religion.

Amendment 2 was not enacted to further any state interest in the free exercise of religion. At trial, Petitioners advanced freedom of religion as an interest of the state served by Amendment 2. They now assert that "freedom of choice [regarding] religion," (Br. for Pet'r at 39-40), is a legitimate state interest advanced by Amendment 2. They further assert that promotion of religious freedom is a "'compelling' public purpose[] served ---- albeit inexactly --- by Amendment 2." (Br. for Pet'r at 40.) Petitioners have not, however, asserted that there exists any compelling state interest served by Amendment 2.[7] *Amicus* addresses the issue of religious free exercise separately because the Supreme Court of Colorado "[a]ssum[ed] *arguendo*" that anti-discrimination ordinances such as those in place in Aspen and Boulder burden religious liberty. *Evans II,* 882 P.2d at 1342.[8]

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[7] Free exercise of religion was not found to be a compelling state interest by the Colorado Supreme Court. That court noted only that "[freedom of religion] is among the highest values of our society," *Evans II*, 882 P.2d at 1342, and that "ensuring religious freedom is a compelling governmental interest," *id.*, but held that "none of the interests identified by [Petitioners] are compelling." *Id.* at 1342 n.5.

[8] Even if relieving a burden on the free exercise of religion was a compelling state interest, Amendment 2 remains constitutionally infirm. Petitioners readily admit that "[t]o promote free exercise values by [Amendment 2] may not be a tailored response," (Br. for Pet'r at 45), to the claimed burdens imposed by the anti-discrimination ordinances in Aspen and Boulder. *Amicus* contends that encouraging wholesale private discrimination against homosexual citizens by other Colorado citizens, regardless of whether those citizens' free exercise rights are actually burdened, can never constitute a tailored response to any compelling state interest.

As the Colorado Supreme Court found, "the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious

While *Amicus* agrees that facilitating the free exercise of religion can be a legitimate state interest, such an interest does not exist in this case. And although this case does not represent a free exercise claim, the Court's Free Exercise Clause jurisprudence informs the analysis of Petitioners' assertion that Amendment 2 is rationally related to a legitimate state interest in accommodating the free exercise of religion. The Court has stated that:

> "[l]aws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . . [To permit] a man [to] excuse his practices to the contrary because of his religious belief . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States* 98 U.S. 145, 166-67 (1879)).[9] Furthermore, the Court stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," *id.* at 878-79, and that "'[c]onscientious scruples . . . have not relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'" *Id.* (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). The

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liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose would be simply to require that antidiscrimination laws . . . include exceptions for religiously-based objections." *Evans II*, 882 P.2d at 1342-43.

[9] *See also Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (stating that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests").

Court further held that an asserted claim of religious belief can be "so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

Petitioners state that Amendment 2 more than meets a traditional rational basis test, (Br. for Pet'r at 39), "because the State . . . presented convincing evidence . . . that Amendment 2 promotes freedom of choice (relating to matters of . . . religion)." (Br. for Pet'r at 39-40). The record in this case clearly proclaims otherwise. Petitioners' assertion that "landlords and employers who have sincere and profound religious objections to homosexuality would . . . be compelled to compromise those convictions," (Br. for Pet'r at 44), by the ordinances sought to be repealed by Amendment 2 is wholly without support in the record. No Coloradan landlord or employer --- indeed *no Coloradan* --- presented evidence at trial as having been burdened in his or her religious practice due to the ordinances preempted by Amendment 2.[10] If the record reveals anything about the interests in passing Amendment 2, it is that the proponents of Amendment 2 were motivated by a desire to halt "militant gay aggression." (Pet. for Writ. of Cert. App. C at 7.)

Petitioners' glaring inability to present even a modicum of evidence that Colorado's valid, generally applicable anti-discrimination laws burdened religious freedom clearly establishes that Amendment 2 is not rationally related to a governmental interest in promoting free exercise of religion. *Amicus* thus urges the Court to recognize Petitioners' claim for what it is: A post hoc rationalization made in an effort to resuscitate a moribund and constitutionally infirm law and to mask the Amendment's actual purpose.

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[10] Petitioners assert that Artine Yapoujian, a coffee shop owner whose wife was required to attend sensitivity training after she distributed religious literature on homosexuality to a homosexual employee, was somehow burdened in his free exercise of religion. (Br. for Pet'r. at 44) . However, as Respondents correctly point out, Yapoujian affirmatively stated that he had no religious objection to homosexuality. (Br. in Opp. to Writ of Cert. at 19 n.17.)

Furthermore, *Amicus* submits that Amendment 2 not only fails to relieve any actual burden on religious practice but also arguably creates an establishment of religion in Colorado by placing the state's imprimatur behind an asserted religious belief. The Court has stated that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause . . . ." *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992). While the precise limits of the Establishment Clause's "fundamental limitations" continue to be refined,[11] "one requirement is clear: [A]ccommodation must lift a discernible burden on the free exercise of religion . . . . Concern for the position of religious individuals in the modern regulatory state cannot justify solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief." *Id.* at 677 (Souter, J. concurring) (citations omitted).[12]

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[11] *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2503 (1994) (Kennedy, J., concurring) (stating that "in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines"). In regard to what comprises the Establishment Clause's "fundamental limitations," *Amicus* asserts that a state's action to advance religious freedoms exceed the Clause's fundamental limitations when that action trammels individuals' liberty interests. *Amicus* recognizes that it is beyond question that values of religious freedom embodied in the Religion Clause have been "zealously protected," *Wisconsin v. Yoder*, 460 U.S. at 214, and that the Court has long held that a state may not facilitate general religious liberty by abridging an individual's right to exercise religious liberty. *See Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (stating that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."); *see also Wallace v. Jaffree*, 472 U.S. 38, 60 n.51(1985) (holding that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religions minorities to conform to the prevailing officially approved religion is plain") (citations omitted). This principle should undoubtedly follow when accommodation of religion threatens individual liberty interests — such as the right to petition government for the redress of grievances — which, *Amicus* urges, should be accorded similar zealous protection.

[12] *See also Allegheny County v. ACLU (Greater Pittsburgh Chapter)*, 492 U.S. 573, 601 n.51 (1989) (holding that "[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free

Amendment 2 lifts no discernible burden on the free exercise of religion. Rather, it reflects Colorado's political majority's concern for adherents to a particular religious belief and their position in the modern regulatory state. That is, Amendment 2 seeks to "exempt" those persons with a shared religious view opposing homosexuality from complying with the valid, generally applicable laws regulating housing, employment, and public accommodations. Consequently, Amendment 2 offends the Establishment Clause's command of state neutrality on questions of religion and fails to foreclose religious favoritism in contravention of the "principle at the heart of the Establishment Clause that government should not prefer . . . religion to irreligion." *Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2491 (1994). *Amicus* believes the Court should go slowly in rendering judgment that may support particularized religious beliefs to the burden of non-believers. For "[i]n a free government the security for civil rights must be the same as that for religious rights." The Federalist No. 51, at 351(James Madison) (Jacob E. Cooke, ed., 1961).

III. AMENDMENT 2 DEPRIVES HOMOSEXUAL CITIZENS OF THE PRIVILEGES OR IMMUNITIES UNDER THE FOURTEENTH AMENDMENT TO PEACEABLY ASSEMBLE AND PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES.

Amicus submits that Amendment 2 violates the Privileges or Immunities Clause of the Fourteenth Amendment by allowing a state electorate to intrude upon the rights of homosexual citizens

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exercise of religion. (citation omitted). The display of a creche in a courthouse does not remove any burden on the free exercise of Christianity"); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment) (stating that "in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action").

to peaceably assemble and petition the government for redress of grievances. *See generally Evans II*, 882 P.2d at 1350-56 (Scott, J., concurring).

The meaning of privileges or immunities of citizens of the United States, as used in the Fourteenth Amendment, was first addressed in 1872 in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1872). The rationale of the majority in the *Slaughter-House Cases* recognized the principle of federalism. However, Petitioners cannot demonstrate that the principle was ever intended to empower states with the authority to deprive homosexual citizens, or any citizen of Colorado, of a meaningful opportunity to petition their state or local governments for redress of grievances.

The scope of the Privileges or Immunities Clause was substantially narrowed by the *Slaughter-House Cases.* The majority found that the privileges or immunities of United States citizens are limited to those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. However, the Court intentionally refrained from citing an exhaustive list of those privileges or immunities, reserving its power to define privileges or immunities "*until some case involving those privileges may make it necessary to do so.*" *Id.* at 79 (emphasis added).

Amicus thus submits that the necessity exists to define a vital privilege or immunity in the case *sub judice*. In Colorado, an overbearing majority deprived homosexual citizens of a meaningful opportunity to petition state or local governments for redress of grievances. The deprivation or undue burdening of this privilege or immunity embarrasses the principles of democracy. As Justice Scott declared, "[l]ike the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is *meaningless* if by law government is powerless to act." *Evans II*, 882 P.2d at 1355 (Scott, J., concurring)(emphasis added).

It is true, of course, that majority rule is the cornerstone of democracy. Still, the Framers warned that certain issues should

never be decided by the majority. James Madison, for example, declared that "[i]t is of great importance in a republic, not only to guard society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." *See* The Federalist No. 51, at 351. The scheme of Amendment 2 is illustrative of the type of injustice that the Framers sought to prevent. Under Amendment 2, homosexual citizens' right to lobby would be rendered illusory, because the Amendment bars state representatives from enacting laws in accord with homosexual citizens' interests. Thus the process of persuasion is rendered futile.

Amicus asserts that the opportunity to peaceably assemble and to petition government for the redress of grievances is inviolate under the Privileges or Immunities Clause of the Fourteenth Amendment where denied by state action in the same light as if this fundamental right were denied by the national government. There is ample evidence in the legislative history of the Privileges or Immunities Clause to suggest that peaceable assembly and the petitioning of state governments for redress of grievances is a privilege or immunity of United States citizens.[13] As the authors of the Fourteenth Amendment specifically asserted, the purpose of the Privileges or Immunities Clause was to "restrain the power of the States and compel them at all times to respect . . . [the] fundamental guarantees of [citizens]." *See* Cong. Globe, 39th Cong., 1st Sess. 27565-66 (1866) (statement of Sen. Howard). *Amicus* urges the Court to trust the specific conceptions and intentions of the drafters of the Privileges or Immunities Clause by recognizing that peaceable assembly to petition state governments for redress of grievances are privileges or immunities of United States citizenship.

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[13] For support of this proposition *Amicus* respectfully refers the Court to Justice Scott's concurring opinion in *Evans II*, 882 P.2d at 1350-56. *See also Adamson v. California*, 332 U.S. 46, 92-123 (1947) (Black, J., dissenting).

IV. AMENDMENT 2 VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL.

Amendment 2 violates the fundament right of homosexual citizens to travel, migrate, and move freely between states. Long-standing precedent establishes that "[t]he constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966).[14] Moreover, the Court, has held that whenever a state law infringes upon this constitutionally protected right, the state must justify such infringements as necessary to promote a compelling governmental interest under heightened scrutiny review.[15]

Even if the object and purpose of Amendment 2, on its face, is not interpreted as an attempt to exclude homosexual citizens from the state of Colorado, the inevitable effect of Amendment 2 would be to discourage and deter homosexual citizens from residing in, traveling to, or migrating to Colorado.

While the Court has not explicitly quantified the measure of impact on a citizen's right to travel necessary to give rise to a constitutional violation, the Court has held that a state law violates the right to travel when it *actually deters* such travel, *see, e.g., Crandall v. Nevada,* 73 U.S. (6 Wall.) 35, 43-44 (1867); when inhibiting free movement between states is its primary

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[14] *See also* the Articles of Confederation art. IV (stating that "[t]he free inhabitants of each of these States . . . shall have *free ingress and regress to and from any other State* . . . ." (emphasis added); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (stating that "among the rights and privileges of *National* citizenship recognized are the right to pass freely from State to State"); *Edwards v. California*, 314 U.S. 160, 177 (1941) ("the right of free movement is a right of national citizenship stands on firm historical ground") (Douglas, J., concurring) (emphasis in original); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (holding that the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution") (citation omitted).

[15] *Shapiro v. Thompson*, 394 U.S. 618; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

objective, *see, e.g., Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); or "when it uses any classification which serves to *penalize* the exercise of that right." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (emphasis added) (citations omitted).

The deprivation by Amendment 2 of homosexual citizens' rights imposes real and undue barriers to interstate travel that are unconstitutional.[16] Amendment 2, by subjecting homosexual citizens to both private and governmental discrimination in the state of Colorado, will "actually deter" individuals from traveling or migrating to Colorado. Amendment 2, for example, will inevitably allow restaurant owners, hotel managers, convenience store and gas station owners to exclusively refuse services to citizens who are suspected or known to be homosexuals.[17] Furthermore, by facilitating discrimination and by nullifying legislative and judicial action to allow redress for such discrimination, Amendment 2 eviscerates the concept of citizenship and deprives homosexual citizens of the necessary

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[16] Amendment 2 will undoubtedly result in "more than [just] a negligible or minimal impact on the right to travel . . . ." *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. at 921 (O'Connor, J., dissenting) (arguing that a realistic burden on interstate travel must be shown).

[17] It has long been recognized by the United States Congress and the Supreme Court that state approved discrimination results in a significant impediment against interstate travel. *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964). This raises the issue of whether Amendment 2 is facially invalid because of its deterrent effect on interstate commerce. *See, Edwards v. California*, 314 U.S. at 177-185 (Douglas, Black, Murphy, Jackson, JJ., concurring).

Allowing innkeepers, for example, to discriminate in affording lodging to homosexual and bisexual citizens, on the basis of their sexual orientation, works a substantial burden on interstate commerce by dissuading such citizens from traveling to the state of Colorado. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

This effect is not incidental, especially considering the importance of the tourist industry in Colorado. *See, e.g.*, Laurie Asseo, *High Court to Take Up Major Gay-Rights Case*, Charleston Gazette, Feb. 22, 1995, at 1A (describing Amendment 2 as having cost the state of Colorado "about 40 million in convention business" resulting from boycotts).

safeguards required to travel to or through the state of Colorado.

Amendment 2's inevitable effects will deter homosexual citizens from migrating or resettling to the state. Amendment 2 will in effect require migrating homosexual citizens (including Colorado homosexual citizens) to accept an inferior status to that of other classes of Colorado citizens. *See Shapiro v. Thompson*, 394 U.S. at 627; *cf. Zobel v. Williams*, 457 U.S. 55, 74 (1982). Realistically, homosexual citizens would not risk subjecting themselves to discriminatory treatment by relocating to Colorado, knowing that the state could neither protect them from such discrimination nor provide them with any kind of redress.[18]

Finally, *Amicus* contends that upholding Amendment 2 could establish a dangerous precedent that encourages other states to enact similar laws. In *Crandall,* the Court invalidated a law that allowed the state to levy and collect a capitation tax of one dollar upon every person leaving the state. In acknowledging the unavoidable burden imposed on the freedom of movement of citizens between states, the Court also recognized the perilous effect of setting a precedent for other states to follow which could have resulted in "seriously burden[ing]" the free movement of citizens from one part of the country to the other. *Crandall v. Nevada,* 73 U.S. (6 Wall.) at 46.

Upholding Amendment 2 as a constitutional provision, therefore, could pave the path for similar amendments to be enacted throughout various states, ultimately with the effect of completely denying or seriously burdening the fundamental right of homosexual citizens to travel from one state to another. The right of individuals to pass freely without restraints from one state to another should never be dependent "upon the pleasure of a State over whose territory [individuals] must pass." *Id.* at 43. As

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[18] The cumulative effect of such statutes creates the enormous possibility that its confluent prohibitions will restrict commerce and deny citizens protection from discrimination under the the Privileges or Immunities Clause.

pointed out by Justice Douglas in *Edwards v. California,* if a state tax (referring to *Crandall*) is deemed invalid because of its deleterious impact on a citizen's fundamental right to travel, then "*a fortiori* a state statute which obstructs or in substance prevents that movement must fall." *Edwards v. California*, 314 U.S. at 181 (Douglas, J., concurring).

V. AMENDMENT 2 IMPINGES ON FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioners have contended that enforcement of Amendment 2 would enhance individual freedoms guaranteed by the First Amendment. (Br. for Pet'r at 43.) *Amicus* believes that just the opposite is true. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). The discrimination that Amendment 2 would allow to be visited upon the homosexual citizens of Colorado[19] could effectively silence all meaningful public debate and discussion of the issue.

The First Amendment assures the "unfettered interchange of ideas for the bringing about of political and social change desired by the people."[20] Thus, it is the duty of the Colorado state

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[19] Amendment 2 "prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved . . . ." *Evans II*, 882 P.2d at 1345.

[20] *Roth v. United States*, 354 U.S. 476, 484 (1957). Although the breadth of and extent to which various types of speech are protected by the First Amendment have long been debated by the Court, as well as by scholars, all who have closely examined the issue have conceded that political expression should be accorded the highest protection. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs); *Garrison v. Louisiana*, 379 U.S. 64, 85 (1964) ("speech concerning public affairs is more than self expression; it is the essence of self-government").

government to prevent abridgment of this most "fundamental personal [right] and libert[y]." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Additionally, it is well recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Indeed, the Court has been consistent in striking down laws that have the effect of "reducing the total quantum of speech on a public issue." *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

If the Court fails to affirm the decision of the Supreme Court of Colorado and allows Amendment 2 to take legal effect, *Amicus* believes that the decision will have the real potential of creating a chilling environment, preventing homosexual citizens from expressing their political displeasure with Amendment 2. Homosexual citizens would be forced to remain silent about both their status and their opposition to Amendment 2 in order to avoid retaliatory discrimination on the basis of status, while continually living in fear of discovery. Voicing political disagreement with Amendment 2 would expose the protester to serious practical risks: The potential of loss of employment, eviction, or some other ordered harm, all examples of loss of liberty. *See* Karst, *supra*, at 21.

The extent to which Petitioners desire to seek to quiet the voices of homosexual citizens, in contravention of these long recognized First Amendment protections, is best illustrated by petitioners' comparison of homosexuals with convicted criminals. *See* (Pet. for Writ of Cert. at 16). Taken to its logical conclusion, Petitioners' argument asks that the Court accept the proposition that homosexual citizens enjoy only the rights of political access equivalent to those held by convicted criminals because homosexual sodomy can be outlawed. The Colorado Supreme Court found this reasoning fallacious. *Evans II*, 882 P.2d at 1350.

This contention of Petitioners, although unsound legally, is demonstrative of a desire to quell the political power and voices of, and to limit the liberty of, those most interested in seeing

discrimination against homosexual citizens stopped. Forcing any group to attempt to obtain protective legislation through a rigorous amendment process, while adding the attendant risk of unremediable discrimination, deters open discourse regarding the matter and chills First Amendment rights of groups dedicated to passage of the amendment. *Cf. Williams v. Rhodes*, 393 U.S. 23 (1968). Moreover, the deterrent effect of the law would not result merely from threat of retributive acts against those protesting the implementation of Amendment 2.[21] Rather, any time homosexual citizens voiced a political position that exposed their sexual orientation they would open themselves to state-approved discrimination.[22]

Further, since a person's sexual orientation is not readily apparent, there is a greater risk that landlords and employers would inquire into applicants' sexual preferences. It is not hard to imagine the types of intrusive questions regarding sexual orientation that will become commonplace on application forms for everything from jobs to drivers' licenses. The Court has closely scrutinized government inquiry into associational privacy, *see, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958). *Amicus* believes the Court should be cautious when empowering private citizens to make important public determinations based on the same type of inquiries.

The foreseeable inquiries by private or public agents in Colorado, similar to the reporting requirements struck down in *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), would result in "public exposure and

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[21] The discrimination that would be legalized by Amendment 2, however, would result in egregious harms being visited on those protesting the amendment that are sufficient, by themselves, to invalidate the amendment. *Equality Found. of Cincinnati v. City of Cincinnati*, 860 F. Supp. at 447 (1994), *rev'd*, 1005 U.S. App. LEXIS 10462 (6th Cir. May 12, 1995). *Amicus* believes that the District Court was correct in noting that "the consequences of attempting to supersede the [amendment]" result in "the exorbitant risk of employment and housing discrimination." *Id.* at 446.

[22] *See* discussion at Section I, B, *supra*.

harassment" of homosexual citizens "who chose to exercise [a] personal, intensely private right." *Id.* at 767. In this regard, *Amicus* urges the Court to reconsider the privacy concerns raised by Justice Stevens in *Bowers v. Hardwick*:

> From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

Bowers v. Hardwick, 478 U.S. 186, 218-19 (1986) (Stevens, J., dissenting). Consenting homosexual adults should enjoy a fundamental right of privacy to make decisions about their intimate personal relationships equivalent to their heterosexual counterparts. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969). Selective denial of a fundamental right of privacy based on a history of hatred, intolerance, and marginalization is antithetical to the basic concepts that underpin our Bill of Rights. *See Loving v. Virginia*, 388 U.S. 1 (1967).

Amendment 2's very consequential infringement of fundamental rights is repugnant to the respect accorded to the ideas of social minorities. Justice Brandeis eloquently expressed the highest ideals of the First Amendment when he said that the Framers

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).[23] The fear of reprisal that Amendment 2 would, as a function of the state's imprimatur,[24] instill in those most interested in its opposition must not be triggered.

VI. THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE SEVERAL STATES TO ABROGATE THE FUNDAMENTAL RIGHTS OF STATE CITIZENS.

Petitioners, and *Amici* in support of the Petitioners, have urged the Court to read its prior decisions, evaluate the core principles of federalism, and analyze the Tenth Amendment in order to support the remarkable proposition that the United States Constitution allows the people of Colorado to amend their state constitution in a fashion that contravenes fundamental rights of Colorado citizens.[25] These arguments mischaracterize the Court's prior holdings, traditional conceptions of state sovereignty, and the nature of the Tenth Amendment.

Petitioners particularly rely on the Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to support their new conception of federalism. However, the Petitioners misapprehend the breadth of the *Ashcroft* decision and rely on it to prove too much. The Court in *Ashcroft* merely announced the rule that where Congressional intent is ambiguous, and state sovereignty in choosing qualifications for office-holders is at issue, the Court should carefully scrutinize an interpretation of a national law

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[23] *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) (warning of the dangers of "Orwellian announcement[s]" that "endorse[ ]. . . the principle that too much speech is an evil that the democratic majority can proscribe").

[24] *See Reitman v. Mulkey*, 387 U.S. at 376 (recognizing that the state of California had improperly encouraged private discrimination by discontinuing enforcement of anti-discrimination laws).

[25] The Colorado Courts found no validity in Petitioners' Tenth Amendment arguments. The state's "legal argument is not supported by federal or state case law, nor is it by the Colorado Constitution." *Evans II*, 882 P.2d at 1340.

which would preempt state authority. *Gregory v. Ashcroft*, 501 U.S. at 470. The narrowness of the *Ashcroft* holding has been recognized a number of times. *See Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993); *EEOC v. Massachusetts*, 987 F.2d 64, 69 (1st Cir. 1993). This limited holding cannot be used as the keystone which supports Petitioners' thematic argument that the Court is bound to legitimize the constitutional infringements enacted by the electorate in the state of Colorado.[26]

The true core principles of federalism are embodied in the text of the Tenth Amendment. However, Amendment X of the United States Constitution was formulated not as a sword to be used by the several states to abridge the fundamental rights of social and political minorities, but rather as a shield, to protect the states from federal tyranny and to expedite achievement of "the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. at 459.[27] As the Court made clear in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), "insulation [from federal judicial review] is not carried over when state power is used as an instrument for circumventing a federally protected right." State sovereignty does not create constitutional validity for Amendment 2. Rather, as recognized by all the Colorado courts that have considered the issue, Amendment 2 impinges on numerous constitutionally protected rights and should be struck down as constitutionally infirm.

CONCLUSION

Amicus submits that the case *sub judice* should be affirmed.

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[26] Interestingly, Petitioners fail to indicate why the Court should ignore federalism-based comity principles which would militate for deference to the decision of the Colorado Supreme Court.

[27] *See also Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (recognizing that liberty and justice are non-existent if the state is allowed to abrogate fundamental rights); Robert H. Bork, *Neutral Principals and Some First Amendment Problems*, 47 Ind. L.J. 1, 2-3 (1971) (stating that our Madisonian democracy "assumes that there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them").

Respectfully submitted,

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